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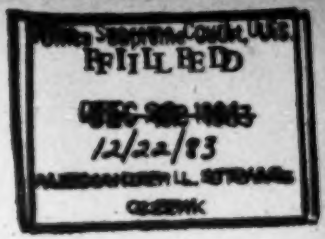

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM P. POINTON, JR., APPELLANT

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
APPELLEE.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, TENTH CIRCUIT

JURISDICTIONAL STATEMENT

December 20, 1983

WILLIAM P. POINTON, JR.
P. O. BOX 10568
MIDWEST CITY, OKLA. 73110
(405) 769-3365

PRO SE

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QUESTIONS PRESENTED

1. Did the judgment of the United States District Court for the Western District of Oklahoma and affirmed by the United States Court of Appeals violate Appellant's due process and equal protection of the laws as stated and implied in the Fifth Amendment to the United States Constitution?

2. Did the United States District Court and the Appeals Court abuse their descretion and therefore violate Appellants due process and equal protection of the laws of the Fifth Amendment?

3. Was the District Court acting impartial when it denied third-party-entry of employees to adjudicate their role in sabotage of Appellant's equipment?

4. Was the Department of Labor impartial in repeatedly refusing to use the Hobbs Act to adjudicate industrial sabotage of Appellant's equipment?

5. Was it a violation of the Eighth Amendment and repugnant to the Constitution that the Department of Labor on several occasions harassed and threatened and did file proceedings that Appellant be cited for contempt and incarcerated?

6. Does pre-judgment interest violate the ex post facto law in Article 1 Section 10. of the Constitution?

PARTIES

The United States Department of Labor acted in the capacity of attorney-in-fact for Appellant's employees, the real parties in interest.

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IN THE

SUPREME COURT OF THE UNITED STATES

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RAYMOND J. DONOVAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR, APPELLEE

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS, TENTH CIRCUIT

JURISDICTIONAL STATEMENT

William P. Pointon, Jr., appellant, appeals from the final judgment of the United States Court of Appeals, Tenth Circuit, dated September 22, 1983, affirming the District Court's denial to permit defendant to bring in third-party-defendants to adjudicate their role in sabotage. Appellant-defendant repeatedly urged the United States Department of Labor to bring charges, as shown in briefs of this case, against former em-

ployees under the Hobbs Act, to adjudicate their role in sabotage of defendant's equipment, thus denying defendant equal protection of the laws as provided in such a situation by the Fifth Amendment to the United States Constitution; the fair-play of offsets of loans made to employees; the offset of a $250,000.00 sabotage against a $9,545.01 overtime claim, and, the Court erred by awarding pre-judgment interest which is contrary to Section 17 of the FLSA, 29 U.S.C. Section 217, the statute that the Department of Labor filed their petition under, thus taking monies without due process of law in violation of defendant's rights under the Fifth Amendment.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, and the United States District Court, which appear in the appendix.

The judgment of the United States Court of Appeals, Tenth Circuit was entered September 22, 1983, see appendix page 6a, and affirmed the judgment of the United States District Court for the Western District of Oklahoma which was entered August 14, 1981, appendix pg. 1a.

JURISDICTION

A supplemental notice of Appeal to this Court was filed within 90 days from judgment of the Appeals Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, § 1252.

QUESTION PRESENTED

Whether the order of the United States District Court for the Western District of Oklahoma and affirmed by the United States Court of Appeals was violative to the due process and equal protection of the laws of the Fifth Amendment to the United States Constitution.

Whether the said United States District Court and the said Appeals Court abused their descretion and therefore violated the due process and equal protection of the laws of the Fifth Amendment.

CONSTITUTIONAL PROVISIONS AND RULES

Fifth Amendment, United States Constitution:

" * * * nor be deprived of life, liberty, or property, without due process of law; * * * "

Eight Amendment, United States Constitution:

" * * * no cruel and unusual punishment inflicted."

In the case at bar the Department of Labor pressed down with relentless harassment of defendant's rights. Several months he was under a barrage of threats of contempt. In a contempt petition filed May 17, 1982, the Department of

Labor petitioned the Court: "That defendant be delivered into the hands of a United States Marshall and incarcerated until such time as he purges himself of his civil contempt by either paying $15,000.00 to plaintiff or submitting a supersedeas bond to the Court in amount of $15,000.00" (Defendant did not have funds to post bond as he was facing possible bankruptcy due to the act and cost of sabotage by the hands of his employees). Plaintiff attempted to persuade the Court to re-institute debtors prison. This was not without trepidation and extreme mental anguish and detriment to the health of defendant.

RAISING THE FEDERAL QUESTION

The Federal Questions raised are as follows:

1. The District Court denied the third-party entry of employees to adjudicate their role in sabotage of defen-

dant's equipment, thereby denying defendant equal protection of the laws, (Fifth Amendment).

2. The Plaintiff, Department of Labor repeatedly refused to invoke the Hobbs Act to adjudicate industrial sabotage of defendant's equipment, thereby again denying defendant equal protection of the laws. (Fifth Amendment).

3. Whether it is repugnant to the constitution that the Department of Labor's in-house-attorney, acting in the capacity as attorney-in fact for employees in an overtime suit, to shield said employees possible criminal indictment by way of the Hobbs Act and to prevent a monetary offset of a $9,545.01 labor claim against a $250,000.00 sabotage and loans made to employees, amounts to invidious reverse discrimination, and therefore violates the Due Process Clause of the Fifth Amendment.

This question of law arises under the constitutionality of the FLSA 29 U.S.C. § 201, et. seq., whose validity is challenged.

4. The District Court was not an "impartial court", irrespective of the awarding of overtime, but as to its ruling of pre-judgment interest, denial of offset to loans made to employees, and the condoning of the harassment meted-out by the Plaintiff to cite defendant for contempt because he was without funds to post bond which constitutes a deprivation of his civil rights under, 42 U.S.C. § 1983, (Sixth Amendment).

5. Plaintiff contends that he was not under the FLSA until the District Court modified and re-construed the law bringing defendant under the act by rendering its judgment on August 14, 1981. During which time he was under constant threat of contempt at the request and

urgings by the Plaintiff during discovery which constituted: " * * * cruel and unusual punishment inflicted," (Eighth Amendment).

6. Pre-judgment interest, retrospective before dates of judgment violates the provision of the ex post facto law in Article 1 Section 10. of the United States Constitution.

STATEMENT OF THE CASE

The Secretary of Labor brought suit against Defendant charging him with violating the FLSA. Defendant maintains he was not engaged in commerce and was thus not under the act.

The Defendant operates a one-man real estate business. For most of his business career he had not worked employees. Defendant has his office in his home. In 1977 defendant purchased some earth moving equipment and hired several

employees. The time frame of their action took place before the plat was filed on property creating employment. There was no interstate work. As the winter of 1977-78 approached defendant suffered severe sabotage to his equipment that amounted to a loss of $250,000.00. Some conclusive evidence pointed directly to defendant's employees with the motive being to slow the job and spend endless hours repairing the sabotage. The Court refused to offset the labor claim against the criminal act of sabotage.

Defendant urged the Plaintiff to file a petition against employees for industrial sabotage pursuant to the Hobbs Act. All urging in this matter fell on deaf-ears. Instead, the Plaintiff ran an interference shield in behalf of the saboteurs acting in a manner as their criminal defence. Next, defendant filed a third-party-entry to bring the sabo-

teurs into this action to have their role adjudicated. The District Court denied their entry.

Defendant had made hardship loans to two employees against their future wages totaling $1,674.48, evidenced by promissory notes, the Court refused an offset.

THE QUESTION IS SUBSTANTIAL

The question as to the violation of Appellant's due process and equal protection of the laws of the Fifth, Sixth, and Eighth Amendments are substantial to the instant case.

In Defendant's first Answer to U.S. Department of Labor's Petition in his Ninth Defense, he asserts:

> "Defendant further answers by alleging that his right to procedual due process in this action have been violated by an investigation that was inadequate and improper for the reason that it failed to develope and consider all facts existing in this case before enforcement suit was filed by the plaintiff * * * "

And again in Defendant's next brief he states:

> "All actions by the Federal Government are subject to constitutional parameters for due process. Defendant asserts that he is subject to proceedings by the Federal Government without being afforded the protection of the Fourth and Fifth Amendments concerning the taking of property without due process and with just compensation and equal protection of the laws."

Then again in a July 21, 1980 brief:

> " * * * * Plaintiff refuses to protect Defendant from Claimants' sabotage of his equipment and provide him equal access to the tribunal of justice. Plaintiff's refusal to investigate or have investigated, Defendant's allegations of Claimants' violation of the Hobbs Act, 18 U.S.C. § 1951, an anti-racketeering act, is tantamount to violation of his civil and constitutional rights to equal protection of the laws. Both the Justice Department and the Department of Labor can and have filed complaints under the Hobbs Act. But in this case the Department of Labor has steadfastly refused and pursues an avenue of discrimination under color of law and refuses to enforce in Defendant's equal rights under the law."

Defendant filed the necessary instruments to bring in third parties, (former employees of defendant), to adjudicate their role in the sabotage. Rule 14 of the District Court's Rules of Civil Procedure states:

> "Rule 14. Third Party Practice (a) When Defendant May Bring in Third Party. At any time after commencement of the action a party plaintiff may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. * * * "

The District Court denied the entry of third parties, clearly violating defendant's constitutional rights granted to him in the due process clause of the Fifth Amendment.

Appellant offers the following Fifth Amendment Citations to the Court: although

> "the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be

> violative of due process.'" Schneider v. Rusk, 84 S. Ct. 1187 (1964).

In Washington v. Davis, 96 S. Ct. 2040 (1976) is a comparable case whereby a class action suit was brought by applicants for employment as police officers against the District of Columbia, the Court said:

> " * * * It is also true that the Due Process Clause of the Fifth Amendment contains an Equal protection conponent prohibiting the United States from invidiously discriminating between individuals or groups. * * * " (Emphasis added).

By ignoring the Hobbs Act the Department of Labor practiced repugnant discrimination against Defendant denying him equal protection of the laws. In Hampton v. Mow Sun Wong, 96 S. Ct. 1895 (1976), the original suit named: " * * * the Chairmen and the Commissioners of the Civil Service Commission and the heads of three agencies * * * " The Court explicitedly stated:

> "The Federal soverign, like the States, must govern impartially. The concept of equal justice under the law is served by the Fifth Amendment's guarantee of due process * * * By reason of the Fifth Amendment, such a deprivation must be accompanied by due process. It follows that some scrutiny of the deprivation is mandated by the Constitution." (Emphasis added).

See also, U.S. Dept. of Agri. et al, v. Moreno et al, 413 U.S. 528, 37 L. Ed 2d 782 and Ex. Bd. of Eng., Arct. and Sur. v. Flores De Otero, 96 S. Ct. 2264 (1964).

The predilection of the Department of Labor is so lacking in rationality that it offends due process.

It is inconceivable that a Department of the United States Government would so abuse the power granted to it as to violate the eighth Amendment in its attempt of incarceration of defendant because of his indigent cash financial position.

CONCLUSION

In view of the foregoing, Appellant respectfully submits his case to this Honorable Court for Review, In the Interest of Justice:

William P. Pointon, Jr.

William P. Pointon, Jr., Pro se
P. O. Box 10568
Midwest City, Oklahoma 73110
(405) 769-3365

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
ss:
COUNTY OF OKLAHOMA)

I, William P. Pointon, Jr., depose and say that I am the appellant herein, and that, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Notice of Appeal To The Supreme Court Of The United States on each of the parties required to be served herein, as follows:

James E. White, Ms. Mary-Helen Mautner, Ms. Beate Bloch, Mr. T. Timothy Ryan, Jr., U.S. Dept. of Labor, 200 Constitutional Avenue, N.W., Room N-2716, Washington, D.C. 20210; U.S. Court Clerk, Herbert Hope, Clerk of the U.S. District Court for the Western District of Oklahoma, Federal Courthouse Building, Oklahoma City, Oklahoma; William P. Pointon, Jr., P.O. Box 10568, Midwest City, Oklahoma, 73110; and Claude V. Sumner, 7546

S.E. 15, Midwest City, Okla. which was mailed on November 16, 1983, and on January 24, 1984, I mailed three copies of the foregoing to the United States Court of Appeals, Tenth Circuit, Office of the Clerk, c404 United States Courthouse, Denver, Colorado 80294, and, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

William P. Pointon, Jr.
William P. Pointon, Jr.

Subscribed and sworn to before me on January 24, 1984.

MY COMMISSION EXPIRES: 4-1-87

Notary Public

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF OKLAHOMA

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

W. P. POINTON, JR.,
Defendant.

No. CIV-79-1034-D

JUDGMENT

In accordance with the findings of fact and conclusions of law signed and entered in this action on the 23rd day of June, 1981, it is,

ORDERED, ADJUDGED and DECREED that defendant, his officers, agents, servants, employees and all persons in active concert or participation with him be and he hereby is permanently enjoined and restrained from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938, as

amended, 29 U.S.C. Section 201, et seq., hereinafter referred to as the Act, in any of the following manners:

1. Defendant shall not, contrary to sections 7 and 15 (a) (2) of the Act, 29 U.S.C. §§ 207 and 215 (a) (2) employ any employee in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for workweeks longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he is employed.

2. Defendant shall not, contrary to sections 11 (c) and 15 (a) (5) of the Act, 29 U.S.C. §§ 211 (c) and 215 (a)(5), fail to make, keep and preserve adequate and accurate records of the persons em-

ployed by him, and the wages, hours and other conditions and practices of employment maintained by him as prescribed by regulations issued by the administrator of the Employment Standards Administration, United States Department of Labor (29 C.F.R. Part 516).

It is further ORDERED, ADJUDGED and DECREED that defendant be, and he hereby is enjoined from withholding payment of overtime compensation in the total amount of $9,545.01 plus interest in the sum of $3,293.00, in the total amount of $12,838.01 which the Court finds is due under the Act to defendant's employees named in Exhibit A attached hereto in the amounts indicated for the period January 25, 1977, to March 17, 1978. To comply with this provision of this judgment, defendant, within thirty (30) days from entry of this judgment shall deliver to the plaintiff a cashier's or certified

check payable to "Employment Standards Administration-Labor" in the total amount of $12,838.01, less social security and income tax deductions, the proceeds of which check the plaintiff shall distribute to defendant's employees named herein. Any net sums which within one year after the payment pursuant to this judgment have not been distributed to such employees, or to their estate if necessary, because of plaintiff's inability to locate the proper persons, or because of their refusal to accept such sums, shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. §§ 2041.

It is further ORDERED that the costs of this action be, and the same hereby are, taxed against defendant for execution may issued.

Done and ordered this 14 day of Au-

gust, 1981.

(Fred Dougherty)
United States District Judge

EXHIBIT "A"

Employee	Overtime Compensation Due	Interest Due	Total
Ginn, C. Lemoine	2,524.38	870.91	3,395.29
Hibdon, Mike B.	108.75	37.51	146.26
Lusk, Charles F.	2,286.25	788.75	3,075.00
Tate, Harold Wayne	1,800.63	621.21	2,421.84
Thomas, Richard A.	852.50	294.11	1,146.61
Thomas, Ronnie D.	1,972.50	680.51	2,653.01
	9,545.01	3,293.00	12,838.01

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 81-2188

RAYMOND J. DONOVAN, Secretary of Labor
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellee,

v.

W. P. POINTON, JR., an individual,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Okla.
(D.C. No. Civ. 79-1034-D)

Claude V. Sumner, Midwest City, Okla., for Defendant-Appellant.

Paula Wright Coleman, Attorney (T. Timothy Ryan, Jr., Solicitor of Labor, Beate Bloch, ASSOCIATE Solicitor, Mary-Helen Mautner and Paula Wright Coleman, Attorneys, with her on the brief) United States Department of Labor, Washington, D.C.

Before Seth, Chief Judge, McWILLIAMS, Circuit Judge, and Kerr,* District Judge

---

McWILLIAMS, Circuit Judge.

---

* Honorable Ewing T. Kerr, U.S. District Judge for the District of Wyoming, sitting by designation.

The Secretary of Labor brought this action under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., to enjoin W.P. Pointon, Jr., from violating the overtime and record-keeping provisions of the Act, and to enjoin the continued withholding by the defendant of unpaid wages due as overtime pay to certain of defendant's employees who operated and performed maintenance on heavy equipment used in the defendant's land development business. Pointon, though admitting that he did not pay his employees time and a half for all hours worked in excess of forty hours per week, denied that his

business was subject to the Act. After a non-jury trial, the district court ruled that Pointon was covered by the Act and that his admitted failure to pay his employees time and a half was a willful violation of the Act. Accordingly, the district court enjoined Pointon from committing future overtime pay and record-keeping violations and from any further withholding of unpaid overtime compensation already due and owing his employees. Pointon appeals. We affirm.

Pointon is engaged in the real estate business in and around Oklahoma City, Oklahoma. During the period from January 29, 1977, through June, 1978, Pointon prepared a 160-acre tract of land near Choctaw, Oklahoma for residential home development in the form of one-acre lots. Such land development work was performed by Pointon's employees, and included removing and thinning trees,

clearing brush, grading and contouring the land for streets and drainage, installing culverts, pouring concrete for curbs and laying asphalt. In performing this work, Pointon's employees operated various types of construction machinery, including earth movers, bulldozers, scrapers, tractors, and chain saws. The employees also performed required maintenance on the equipment, which included fueling and lubricating the equipment, securing replacement parts when necessary, and assisting the mechanic in performing his work on the equipment. Much of this equipment and many of the replacement parts used by Pointon's employees in readying the land for development originated or were manufactured outside the state of Oklahoma, though admittedly many were acquired by Pointon from sources within the state of Oklahoma.

29 U.S.C. § 207 provides, in gen-

eral, for overtime pay for all hours worked in excess of forty hours per week and applies to all persons "employed in an enterprise engaged in commerce or in the production of goods for commerce as defined in section 3 (s) (1) or (4) of this title ...." 29 U.S.C. § 203 (s) provides as follows:

> (s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which--
>
> ....
>
> (4) is engaged in the business of construction or reconstruction, or both;

Under the provisions of the Act referred to immediately above, the district court held that Pointon was subject to the overtime provisions of the Act. Specifically, the district court found

that Pointon's employees were engaged in the construction business and that in performing their duties the employees were handling goods or materials which had moved in interstate commerce.

On appeal, Pointon argues that both of these findings by the district court were erroneous, and that accordingly the district court erred in its conclusion that Pointon was subject to the Act. We disagree.

The record supports the district court's finding that Pointon was engaged in the business of construction, as required by 29 U.S.C. § 203 (s) (4). Clearing undeveloped land, grading and contouring the grounds, installing culverts and pouring concrete for curbs is, to us, a part, indeed an important and necessary first step, in the general business of construction. Brennan v. Whatley, 432 F. Supp. 465 (E.D. Texas, 1977).

Further, the district court did not err in its finding that Pointon's employees in readying the raw land for actual building, handled goods and materials which had moved in interstate commerce. The fact that Pointon may have himself acquired the goods and materials, i.e., the construction equipment and replacement parts, from sources within the state of Oklahoma is irrelevant to a determination of whether Pointon is a covered employer. Brenan v. Dillion, 483 F. 2d 1334, 1337 (10th Cir. 1973). The critical issue is whether the goods or materials handled by Pointon and his employees had moved in interstate commerce, and, in this regard, it is undisputed that they did. "Using" goods or materials which have moved in interstate commerce constitutes a "handling" within the meaning of 29 U.S.C. § 203 (s). Brennan v. Dillion, supra; Marshall v. Brunner, 668 F.

2d 748 (3rd Cir. 1982); Donovan v. Scoles, 652 F. 2d 16 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Having determined that Pointon is subject to the Act, it is agreed that he did not pay his employees overtime pay as required by the Act. The district court held that these violations were "willful," within the meaning of the Act, and accordingly applied the three-year statute of limitations. 29 U.S.C. § 255 (a). Pointon urges on appeal that the district court erred in holding that his failure to pay overtime was "willful". We disagree, and conclude that the record supports the district court's finding.

In order to establish a "willful" violation of the Act, it is not necessary to show that the employer actually "knew" that he was violating the Act.

It is sufficient to show that the employer knew the Act was "in the pic-

ture" so that he is aware of the Act's possible application to his employees. Mistretta v. Sandia Corp., 639 F. 2d 588 (10th Cir. 1980). Where the employer knows of this fact and marches forward with apparent disregard, his acts are deemed to be "willful". Further, in the instant case, it is undisputed that Pointon so kept his business records as to indicate that he was paying overtime in accordance with the Act, when, in fact, he was not.

This action, as indicated, was brought by the Secretary to enjoin Pointon from employment practices which the Secretary believed violated the Act. One part of the injunctive order entered by the district court enjoined Pointon from continued withholding of overtime pay due his employees. By various pre-trial requests, Pointon sought to assert setoffs, counterclaims, and third-party com-

plaints based upon claims that two of his employees allegedly owed him money for sums which he had advanced to them and that certain employees were liable to him in tort for acts of sabotage.

Pointon sought to set off against any amounts found to be due his employees offsetting sums which he claimed were due him by such employees. The district court denied all such requests, and its ruling in this regard is now assigned as error. We find no such error.

As indicated, the purpose of the present action is to bring Pointon into compliance with the Act by enforcing a public right. To permit him in such a proceeding to try his private claims, real or imagined, against his employees would delay and even subvert the whole process. Pointon is free to sue his employees in state court, as we are advised he is doing, for any sum which he feels

is due and owing him. Brennan v. Heard, 491 F. 2d 1, 4 (5th Cir. 1974) and NLRB v. Mooney Aircraft, Inc., 366 F. 2d 809, 811 (5th Cir. 1966).

In conclusional terms and without supporting authority, Pointon argues that the district court erred in awarding pre-judgment interest on the amounts determined to be due and owing his employees. We are not persuaded by the argument as made.

Judgment affirmed.

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